NO. 48489-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HORN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael Evans, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his right to present a defense when the trial court refused to allow him to present evidence relevant to rebutting the State's case.

2. RCW 43.43.7541's DNA-collection fee and RCW 7.68.035's Victim Penalty Assessment (VPA) violate substantive due process when applied to defendants who do not have the ability – or likely future ability – to pay.

3. Should the State seek appellate fees, those should be denied.

Issues Pertaining to Assignments of Error

1. The defense sought to introduce evidence that was relevant to challenging the complaining witness' credibility regarding an element of a charge against him. The trial court excluded it. Was the defendant denied his right to present a defense?

2. RCW 43.43.7541 requires trial courts impose a DNA-collection fee each time a felony offender is sentenced. This ostensibly serves the State's interest in funding the collection, testing, and retention of a convicted defendant's DNA profile. RCW 7.68.035 requires trial courts to impose a VPA of $500. The

purpose is to fund victim-focused programs. These statutes mandate that trial courts order these LFOs even when the defendant has no ability to pay. Do the statutes violate substantive due process when applied to defendants who do not have the ability – or the likely future ability – to pay the fees?

3. Appellant is indigent. If the State seeks appellate costs, should those be denied?

B. STATEMENT OF THE CASE

1. Procedural History

On August 8, 2015, the Cowlitz County prosecutor charged appellant Michael Ray Horn with: one count of first degree assault; one count of second degree assault; one count of second degree unlawful possession of a firearm; and one count of felony harassment with a domestic violence (dv) enhancement. CP 1-3. The prosecutor was later allowed to amend the first degree assault charge to second degree assault. CP 5-14. At trial, for both assault charges, the jury was instructed on fourth degree assault as the lesser included offenses. CP 20-24.

The jury acquitted Horn of both counts of second degree assault. CP 67, 69, 76. However, it convicted him of two counts of fourth degree assault, unlawful possession of a firearm, and dv

felony harassment. CP 68, 70, 71, 72, 77. The trial court sentenced Horn to two terms of 364 days and an 8-month term, running them each consecutively. RP 79-91. The trial court also imposed a $100 DNA-collection fee and a $500 VPA. CP 86-87. Horn appeals. CP 92-105.

2. Substantive Facts

Michael Horn met Suzy Oubre in Woodland, Washington where they both resided. RP 132. The two had an affair. RP 256. In January 2015, Oubre decided to leave a 17-year relationship she had with Dan Kopp to be with Horn. RP 131, 303. Horn had recently broken up with his girlfriend, Laurie. Oubre and Horn started openly dating. RP 137.

T he relationship started out good. RP 138-39, 303. However, their dating prompted much gossip and animosity toward Horn as people blamed Horn for the Oubre and Kopp's break-up. RP 261. This was stressful for Horn, especially when going out socially. RP 618. He preferred to stay home. RP 263. Oubre wanted more of a social life. RP 271.

There were also complications with their former partners. Oubre decided Laurie "was crazier than a fruitcake." RP 277. Oubre made sure Horn got rid of all of Laurie's possessions that

she had left behind at Horn's house. RP 276. Horn wanted to hold them until Laurie was in a position to claim them, but Oubre made sure they were disposed of quickly. RP 276, 600.

By contrast, throughout her relationship with Horn, Oubre kept Kopp's property in her garage despite the fact that it irritated Horn. RP 142. In fact, Kopp would come over to Oubre's house, do his laundry, and use the shower. RP 608. Kopp's continued presence was frustrating for Horn. RP 604, 609.

Horn suffers from PTSD and was open about this to Oubre. RP 283. Oubre had never dated anyone with PTSD, but realized that in combination with alcohol, Horn could become angry and paranoid. RP 268. According to Oubre, Horn was jealous, wanted her undivided attention, and was controlling. RP 156-57, 165-66. However, she believed Horn was mostly sweet and loved him. RP 149, 303.

According to Oubre, an unusual incident occurred in late January 2015. RP 140. After the two had been drinking at her house, the defendant became jealous of Oubre and Kopp. RP 140. When she went to get her cellphone, he questioned her about her texts. RP 140. According to Oubre, Horn ripped her nightshirt, hit her, took her keys so she could not leave, wrestled her to the

ground, and bit her several times. RP 141-46.

Yet, Oubre did not go to the police. RP 146. Although she temporarily ended the relationship, she was back with Horn a few weeks later and the two took an extended vacation to Mexico where she met Horn's mother. RP 151, 155, 254, 595. They also began looking at engagement rings as they were planning to get married. RP 596.

After dating continuously for several months, on August 4, 2015, Oubre texted Horn and said she wanted to break up. RP 170. She testified that she had driven a good distance away because she was fearful and doesn't like confrontation. RP 170-71, 194. However, after Oubre gave Horn the "silent treatment" for a bit, she came back and the two were back together that night. RP 642.

On August 7, 2015, while working a shift at the hospital (Oubre is a nurse), Oubre told Horn she did not want him to come to her house that night because she was "PMSing" and didn't feel good. RP 195. Later, she texted and said she did not want to be in a relationship with him anymore. RP 196. Horn took Oubre's attempts to break up with a grain of salt given that she was "PMSing" and that she was often emotionally inconsistent. RP 637-

39, 654.

After having a few drinks at a local bar, Horn headed over to Oubre's house for a typical evening. RP 598, 600. The two had a bit of a ritual where they would have their own happy hour with Horn drawing a bath for Oubre, pouring her a glass of wine, and afterward they would have dinner and talk. RP 602-03, 623. Horn arrived at Oubre's house shortly after she had come home, bringing dinner and a bottle of wine. RP 199.

As usual, Horn drew Oubre's bath, and they ate dinner and drank wine. RP 200, 600, 602-03. At some point in the evening, Oubre took Horn's keys and wallet so that he could not drive after drinking. RP 297.

As they began to get ready for bed at around 10:45 p.m., Oubre got on her cellphone and began playing games with friends. RP 201-02. She claims Horn immediately started to question her about who she was texting and accused her of having been on a boat with Kopp recently. RP 203.

Oubre told Horn she wanted to break up. RP 205. According to Oubre, Horn became angry and ripped her bra off. RP 205-06. Oubre said she got mad and struck Horn. RP 207. According Oubre, Horn punched her in the eye, fracturing her eye

socket and knocking her to the floor. RP 208, 308. He demanded to see her texts. RP 211. Oubre testified that as Horn scanned her messages, she attempted to leave, but Horn kicked her in the stomach. RP 211.

Reportedly, Horn would not let Oubre leave, so she lay down on the bed. RP 213. She claimed Horn got her gun, which she kept under her mattress, and said they were both going to die that night. RP 213, 215-16. According to Oubre, Horn straddled her, cocked the gun, placed it in his mouth, and asked her how she would feel if he killed himself. RP 216. Then he put the gun to her head. RP 218. Oubre claimed that Horn locked the door, shut the blinds, and said several times they were both going to die. RP 222.

Oubre testified that at some point, she tried to run to the door, but Horn grabbed her and pummeled her. RP 223. Oubre said this released Horn's anger. RP 224. Afterward, she coaxed him to the bed, said loving things, and soothed him. RP 229. Horn eventually fell asleep. RP 229-30. Afterward, Oubre snuck out and went to a nearby medical clinic. RP 233, 35. It was determined she had a fractured eye socket and numerous bruises. RP 115-18. Horn recalled very little of what transpired that night. He remembered arguing about Kopp and feeling very stressed. RP

609. He wanted to leave and go back to his cabin so he could relax about the situation. RP 610. He could not leave, however, because Oubre had wrestled his keys and wallet from him. RP 609. Horn remembered wrestling, but then he blacked out and did not remember anything until he woke up and Oubre was gone.[1] RP 612.

Horn was arrested. RP 364. After he bailed out on August 20, 2015, he and Oubre got back together. RP 70, 76, 502. They willingly took a trip to Oahu together and officially got engaged on September 5, 2015. RP 70, 76, 502. Thereafter, they went away on another trip together. RP 76.

In early October, however, there was another incident between the two, which resulted in Horn being charged with misdemeanor violation of a no-contact order to which he pled guilty. RP 73, 579.

3. The Court's Exclusion of Defense Evidence

Prior to trial, the State made a motion to present evidence of the January incident. RP 59. It argued that Oubre would testify it was the January incident that made her fear for her life when Horn

[1] Horn told police substantially the same thing after the incident. The jury was permitted to see the video interview. RP 511-69.

threatened her in August. The State argued this evidence was relevant to show Oubre genuinely feared Horn. RP 60-61, 69.

Defense Counsel objected, arguing that it was 404(b) evidence that was being used to show conformity. RP 62-64. Alternatively, he argued that if the State was allowed to present facts pertaining to the January incident, he should be permitted to introduce evidence of the fact that Oubre resumed their relationship after Horn was released on bail, traveled with Horn on two trips, and got engaged to him. RP 64-66, 70-71. Defense counsel argued that this was relevant to show that Oubre never truly feared for her life during the August incident. Id.

In response, the State argued that admitting this evidence would necessarily open the door to evidence Horn violated a no contact order. RP 72. It also claimed that it would open the door to all of the details of that incident, which included allegations of burglary and a video of Horn jumping naked on Oubre's car as she attempted to flee. RP 72-73.

The Court ruled the evidence pertaining to the January incident was admissible because it was relevant to the fear element of felony harassment. RP 77-78. However, the trial court denied Horn's motion to admit evidence showing that Oubre resumed a

romantic relationship with Horn after he bailed out, traveled with him, and got engaged to him. RP 80-83. The trial court speculated that Oubre's actions may have been motivated by a desire to protect herself and placate placate Horn. RP 81. It also expressed concern that the proffered evidence could make the issues confusing because it would open the door to evidence Horn violated a no-contact order while resuming his relationship with Oubre and all the factual details surrounding his arrest in October. RP 82.

C. ARGUMENT

I. HORN WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

Horn was denied his right to present a defense when the trial court excluded evidence of Oubre's continued relationship with Horn after he posted bail. This evidence was relevant to rebutting the State's case on the felony harassment charge and it was not so prejudicial as to disrupt the fairness of the trial. Hence, the trial court erred in excluding it.

The Sixth and Fourteenth Amendments to the United States Constitution,[2] and article 1, § 22 of the Washington Constitution,[3] guarantee a defendant the right to defend against the State's allegations. This is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S.

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[2] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

[3] Article 1, § 22 provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases...

Ct. 1038 (1973); Washington v. Texas, 338 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967).

A claimed violation of the Sixth Amendment right to present a defense is reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). Under the Sixth Amendment, "'[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" Id. at 720 (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). "A defendant's right to an opportunity to be heard in his defense ... is basic in our system of jurisprudence." Id.

That right is not absolute, however. Id. Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence. State v. Gregory, 158 Wn.2d 759, 786 n. 6, 147 P.3d 1201 (2006). Hence, for defense evidence to be admissible it must be at least minimally relevant. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

To be relevant, evidence need only tend to prove or disprove the existence of a fact that is of consequence to the outcome of the case, including facts that provide evidence of any element of a defense. ER 401. [T]he threshold for relevance is extremely low

under ER 401...." City of Kennewick v. Day, 142 Wn.2d 1, 8, 11 P.3d 304 (2000). Relevance merely requires a "logical nexus" between the evidence and the fact to be established. State v. Peterson, 35 Wn. App. 481, 484, 667 P.2d 645 (1983).

Once defense evidence is shown to be relevant, "the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wn.2d at 622. The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." Id. The Supreme Court has cautioned that courts must remember "the integrity of the truthfinding process and [a] defendant's right to a fair trial" are important considerations. State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983).

Here, the defense sought to introduce evidence that Oubre resumed her relationship with Horn after the August incident, traveled with him on two romantic trips, and got engaged to him. From these facts, a reasonable juror could infer that Oubre never genuinely feared Horn was capable of killing her during the August incident. As such, this evidence was relevant to rebut Oubre's

testimony that she had been scared for her life during the August incident. RP 152, 214. Thus, there is a logical nexus.

Because the evidence was relevant, it could not be excluded unless: (1) it was "so prejudicial as to disrupt the fairness of the fact-finding process at trial;" and (2) the State's interest in excluding prejudicial evidence outweighed the defense need for the evidence. Darden, 145 Wn.2d at 622. Neither the trial court's reasoning nor the record support either of these factors.

First, the trial court speculated what Oubre's motivation might have been when she got back together with Horn, and decided it weakened the value of the proffered evidence. However, such considerations went to the weight of the evidence, not its admissibility. It should have been for the jury to decide whether Oubre's decision to reengage her romance with Horn was proof that she never truly feared him or merely an attempt to placate him. Thus, the trial court's speculation as to Oubre's motives in getting back together with Horn was not sufficient grounds for excluding the evidence.

Second, the trial court also reasoned that admitting evidence of Oubre's reengagement in the relationship would have muddied the issues on grounds it opened the door to Horn's violation of the

no-contact order. However, any potential for confusion could have been easily cured through a limiting instruction telling the jury it could not use the fact Horn violated a no-contact order as evidence of his guilt for the charged offense. This Court must presume that such an instruction would have been followed.[4] Hence, any potential prejudice or confusion of the issues could have been easily mitigated. The balance of considerations tipped in favor of Horn's right to present this evidence in his defense.

As for the specific facts underlying Horn's ultimate arrest in early October, the trial court should have excluded these detailed facts under ER 404(b) and ER 403 because they were not relevant to prove anything material to the question of Oubre's fear in August. Instead, they only went to show propensity. Hence, these facts were more prejudicial than probative. However, even if proffered defense evidence opened the door to these facts, again a limiting instruction could have been given to mitigate the prejudicial impact or confusion.

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[4] State v. Anderson, 153 Wn. App. 417, 427, 428 220 P.3d 1273 (2009) (explaining that appellate courts presume the jury follows instructions given by the trial court).

Ultimately, it should have been left to the defense team to make a strategic decision whether it believed that the benefit of introducing the proffered evidence outweighed any potential risks from opening the door to other evidence. Indeed, it is the defendant's right to present his case as he sees fits so long as the fairness of the fact-finding is not disrupted. As explained above, there was a way in which this evidence in conjunction with a limiting instruction could have been introduced so that the trial remained fair and the defense had the opportunity to present a complete defense.

In sum, the trial court erred in excluding the defense evidence that Oubre resumed her romantic relationship with Horn after the August incident, traveled with him, and got engaged. In doing so, it denied Horn his constitutional right to present a defense to the felony harassment charge. Consequently, this Court should reverse that conviction.

II. RCW 43.43.7541 AND RCW 7.68.035 ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY LFOS.[5]

RCW 9.94A.760 permits the trial court to impose costs "authorized by law" when sentencing an offender for a felony. RCW 43.43.7541 authorizes the collection of a $100 DNA-collection fee. RCW 7.68.035 provides that a $500 VPA "shall be imposed" upon anyone who has been found guilty in a Washington Superior court. However, these statutes violate substantive due process when applied to defendants, like Horn, who have not been determined have the ability or likely future ability to pay the fine. Hence, this Court should find the trial court erred in imposing these fees without first determining Horn's ability to pay.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections."

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[5] Appellant recognizes that this issue was rejected by this case in State v. Helton and State v. Lewis. Because the issue is being petitioned to the Supreme Court In State v. Lewis and thus is not fully settled, appellant raises it herein to preserve the issue should the state of the law change.

Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. at 218–19. It requires that "deprivations of life, liberty, or property be substantively reasonable;" in other words, such deprivations are constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221, 1225 (2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130, 1135 (2013). Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is lighter under this standard, the

standard is not meaningless. Indeed, the United States Supreme Court has cautioned the rational basis test "is not a toothless one." Mathews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, "the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional." DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining the statute at issue did not survive rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

Turning first to RCW 43.43.7541, the statute mandates all felony defendants pay the DNA-collection fee. This on its face may serve the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752-7541. This is a legitimate interest. However, the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

As for RCW 7.68.035, it mandates that all convicted defendants pay a $500 VPA. This on its face may serve the State's

interest in funding "comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035(4). Again, while this may be a legitimate interest, there is nothing reasonable about requiring sentencing courts to impose the VPA upon defendants regardless of whether they have the ability – or likely future ability – to pay.

Imposing these fees does not further the State's interest in funding DNA collection or victim-focused programs. For as the Washington Supreme Court recently emphasized, "the state cannot collect money from defendants who cannot pay." State v. Blazina, 182 Wn.2d 827, 344 P.3d 680, 684 (2015). Hence, there is no legitimate economic incentive served in imposing these LFOs.

Likewise, the State's interest in enhancing offender accountability is also not served by requiring a defendant to pay mandatory LFOs when he does not have the ability to do so. In order to foster accountability, a sentencing condition must be something that is achievable in the first place. If it is not, the condition actually undermines efforts to hold a defendant answerable.

The Supreme Court also recognized that the State's interest in deterring crime via enforced LFOs is actually undermined when

LFOs are imposed on people who do not have the ability to pay. Id. This is because imposing LFOs upon a person who does not have the ability to pay actually "increase[s] the chances of recidivism." Id. at 836-37 (citing relevant studies and reports).

Likewise, the State's interest in uniform sentencing is not served by imposing mandatory LFOs on those who do not have the ability to pay. This is because defendants who cannot pay are subject to an undeterminable length of involvement with the criminal justice system and often end up paying considerably more than the original LFOs imposed (due to interest and collection fees), and in turn, considerably more than their wealthier counterparts. Id. at 836-37.

When applied to indigent defendants, not only do the so-called mandatory fees ordered under RCW 43.43.7541 and RCW 7.68.035 fail to further the State's interest, they are utterly pointless. It is simply irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue appellant's due process challenge is foreclosed by the Washington Supreme Court's rulings in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), which conclude due

process was not violated with the imposition of the VPA regardless of whether there was an ability-to-pay inquiry. However, the "constitutional principles" at issue in those cases were considerably different than those implicated here. Hence, any reliance on these cases would be misplaced.

Horn's constitutional challenge to the statute authorizing the DNA-collection fee and VPA is fundamentally different from that raised in Curry. In Curry, 118 Wn.2d at 917, the defendants challenged the constitutionality of a mandatory LFO order on the ground that its enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they are unable to pay LFOs. Hence, Curry's constitutional challenge was grounded in the well-established constitutional principle that due process does not tolerate the incarceration of people simply because they are poor. Id.

By contrast, Horn asserts there is no legitimate state interest in requiring sentencing courts to impose a mandatory DNA-collection fee without the State first establishing the defendant's ability to pay. In other words, rather than challenging the constitutionality of the LFO statute based on the fundamental unfairness of its ultimate enforcement potential (as was the case in

Curry and Blank), Horn challenges the statute as an unconstitutional exercise of the State's regulatory power that is irrational when applied to defendants who have not been shown to have the ability to pay. As such, the holdings in Curry and Blank do not control.

The State's reliance on Curry and Blank would also be misplaced because when those cases are read carefully and considered in the light of the realities of Washington's current LFO collection scheme, they actually support Horn's position that an ability-to-pay inquiry must occur at the time any LFO is imposed. Indeed, after Blazina's recognition of the Washington State's "broken LFO system," 182 Wn.2d at 835, the Washington Supreme Court's holdings in Curry and Blank must be revisited in the context of Washington's current LFO scheme.

Currently, Washington's laws set forth an elaborate and aggressive collections process which includes the immediate assessment of interest, enforced collections via wage garnishment, payroll deductions, and wage assignments (which include further penalties), and potential arrest. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See, Alexes Harris et al.,

Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay).

Washington's legislatively sanctioned debt cycle does not conform to the necessary constitutional safeguards established in Blank. In Blank, the Washington Supreme Court held that "monetary assessments which are mandatory may be imposed against defendants without a per se constitutional violation." Blank, 131 Wn.2d at 240 (emphasis added). The Court reasoned that fundamental fairness concerns only arise if the government seeks to enforce collection of the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (referring to Curry, 118 Wn.2d at 917-18).

The Washington Supreme Court also noted, however, that the constitutionality of Washington's LFO statutes was dependent on trial courts conducting an ability-to-pay inquiry at certain key times. It emphasized the following triggers for this inquiry:

- "The relevant time [to conduct an ability-to-pay inquiry] is the point of collection and when sanctions are sought for nonpayment." Id. at 242.

- "[I]f the State seeks to impose some additional penalty for failure to pay...ability to pay must be considered at that point. Id.

- "[B]efore enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." Id.

Blank thus makes clear that in order for Washington's LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry before: (1) the State engages in any "enforced" collection; (2) any additional "penalty" for nonpayment is assessed; or (3) any other "sanction" for nonpayment is imposed.[6] Id.

Given Washington's current LFO collection scheme, the only way to regularly comply with Blank's safeguards is for sentencing courts to conduct a meaningful ability-to-pay inquiry at the time the VPA or DNA-collection fee is imposed. Although Blank says that

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[6] "Penalty" means: "a sum of money which the law exacts payment of by way of punishment for... not doing some act which is required to be done." Black's Law Dictionary, Sixth Edition, at 1133.

"Sanction" means: "Penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations." Id., at 1341.

"Enforce" means: "To put into execution, to cause to take effect, to make effective; as to enforce ... the collection of a debt or a fine." Id. at 528.

prior case law suggests that such an inquiry is not required at sentencing, the Supreme Court was not confronted with the realities of the State's current collection scheme in that case. As shown below, Washington's LFO collection scheme provides for immediate enforced collection processes, penalties, and sanctions. Consequently, Blank actually supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing when the VPA or DNA-collection fee is imposed.

First, under RCW 10.82.090(1), LFOs accrue interest at a compounding rate of 12 percent – an astounding level given the historically low interests rates of the last several years. Blazina, 182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013). Interest on LFOs accrues from the date of judgment. RCW 10.82.090. This sanction has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. See, Harris, supra at 1776-77 (explaining that "those who make regular payments of $50 a month toward a typical legal debt will remain in arrears 30 years later). Yet, there is no

requirement for the court to have conducted an inquiry into ability to pay before interest is assessed.

Washington law also permits courts to order a "payroll deduction." RCW 9.94A.760(3). This can be done immediately upon sentencing. RCW 9.94A.760(3). Beyond the actual deduction to cover the outstanding LFO payment, employers are authorized to deduct other fees from the employee's earnings. RCW 9.94A.7604(4). This constitutes an enforced collection process with an additional sanction. Yet, there is no provision requiring an ability-to-pay inquiry before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; see also, Harris, supra, at 1778 (providing examples of wage garnishment as an enforcement mechanism used in Washington). As for garnishment, this enforced collection may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment is a collection mechanism that may be used within 30 days of a defendant's failure to pay the monthly sum ordered. RCW 9.94A.7701. Again, employers are permitted to charge a "processing fee." RCW

9.94A.7705. Contrary to Blank, however, there are no provisions requiring courts to conduct an ability-to-pay inquiry prior to the use of these enforced collection mechanisms.

Washington law also permits courts to use collections agencies or county collection services to actively collect LFOs. RCW 36.18.190. Any penalties or additional fees these agencies decide to assess are paid by the defendant. Id. There is nothing in the statute that prohibits the courts from using collections services immediately after sentencing. Yet, there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement. Id.

The examples set forth above show that under Washington's currently "broken" LFO system, there are many instances where the Legislature provides for "enforced collection" and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms may be used immediately after the judgment and sentence is entered. If the constitutional requirements set forth in Curry and Blank are to be met, trial courts must conduct a thorough ability-to-pay inquiry at the time of sentencing when the LFOs are imposed. As such, any reliance on holdings of Curry and Blank by the State would be

specious because Washington's current LFO system does not meet the constitutional safeguards mandated in those holdings.

In sum, Washington's LFO system is broken in part because the courts have not followed through with the constitutional requirement that LFOs only be imposed upon those that have the ability – or likely ability – to pay. It is not rational to impose a fee upon a person who does not have the ability to pay. Hence, when applied to defendants such as Horn who do not have the ability to pay LFOs, the mandatory imposition of the DNA-collection fee and VPA does not reasonably relate to the State interests served by those statutes. Consequently, this Court should find RCW 43.43.7541 and RCW 7.68.035 violate substantive due process and vacate the LFO order.

III. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Horn was represented below by appointed counsel. CP 106. The trial court found him indigent for purposes of this appeal. CP 106-08. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

At sentencing, the court imposed only the $500 VPA and $100 DNA fee. CP 85-86. Horn may be ordered to pay a substantial sum in restitution. CP 86. He faces considerably more financial debt if this Court were to impose appellate costs upon him. He requests this court deny any costs sought.

Under RCW 10.73.160(1), appellate courts "*may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "*unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, 192 Wn. App. 380, 389-91, 367 P.3d 612, 616 (2016), review denied, 185 Wn.2d 1034 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in "compelling circumstances." State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, "it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an

appellant's brief. Sinclair, 192 Wn. App. at 389-90. Moreover, ability to pay is an important factor that may be considered. Id.

Based on Horn's indigence, this Court should exercise its discretion and deny any requests for costs in the event the State is the substantially prevailing party.

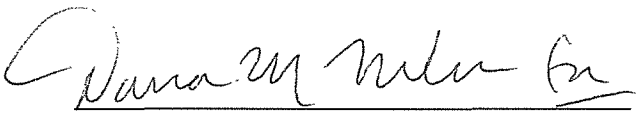
D. CONCLUSION

For reasons stated above, this Court should find appellant was denied his right to present a defense. Alternatively, this Court should strike the trial court's order that Horn pay LFOs and remand for a hearing to determine his ability to pay.

Dated this 31ST day of August, 2016.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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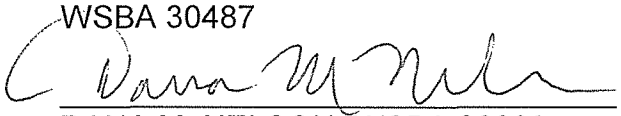

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